

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 11 Case
	)	Number <u>88-11533</u>
GEORGIA SCALE COMPANY	)	
	)	
Debtor	)	
_____)	)	
	)	
GEORGIA SCALE COMPANY	)	FILED
	)	at 6 O'clock & 04 min. P.M.
Plaintiff	)	Date: 3-29-91
	)	
vs.	)	Adversary Proceeding
	)	Number <u>89-1094</u>
TOLEDO SCALE CORPORATION	)	
	)	
Defendant	)	

**MEMORANDUM AND ORDER**

Before the court is a motion for summary judgment or in the alternative dismissal filed by Toledo Scale Corporation, defendant in this adversary proceeding (hereinafter "defendant". In response to the motion Georgia Scale Company, plaintiff and debtor-in-possession in the underlying Chapter 11 proceeding, (hereinafter "debtor") in addition to opposing summary judgment, seeks leave of court to amend its complaint. The defendant objects to the allowance of an amended complaint. The court granted leave of the debtor to submit its amended complaint for consideration.

Based upon the evidence presented by affidavit, briefs filed, and the schedules and approved disclosure statement of the debtor and allowed proofs of claim submitted in the underlying Chapter 11 proceeding this court makes the following findings.

**AMENDED COMPLAINT**

Under Bankruptcy Rule 7015,<sup>1</sup> incorporating Federal Rule of Civil Procedure (FRCP 15), leave to amend freely shall be given when justice requires. See generally Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.E.2d 222, 226 (1962); Thomas v. Town of Davie, 847 F.2d 771, 773 (11th Cir. 1988). A refusal to grant leave to amend without justification is an abuse of discretion and inconsistent with the spirit of the federal rules. See e.g. Foman v. Davis supra; Loanstar Motor Import v. Citron Cars, 288 F.2d 69, 75 (5th Cir. 1961). The proposed amended complaint includes causes of action not previously pled. The purpose of pleadings are to

facilitate a decision on the merits and in the absence of delaying tactics, bad faith or prejudice to a responding party leave to amend must be freely given. In re: Dunn, 49 B.R. 547, 550 (Bankr. W.D. N.Y. 1985). In addition to the new causes of action, the debtor seeks to amend in order to clarify several elements of its original complaint. Amendments are permitted to cure pleading defects in bankruptcy proceedings, including adversary proceeding. Wright & Miller Federal Practice and Procedure 1472 (2d ed. 1990).

A district court should give a plaintiff an opportunity to amend its complaint rather than dismiss whenever it appears that a more carefully drafted complaint might

---

<sup>1</sup>Bankruptcy Rule 7015 (FRCP 15) provides in pertinent part:

(a) Amendment. A party may amend his pleadings once as a matter of course any time before a responsive pleading is served or, otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party . . . (b) . . . the court may allow the pleadings to be amended and shall do so freely when the presentations of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

state a claim upon which relief may be granted. (citation omitted). Freedlander v. Nims, 755 F.2d 810, 813 (11th Cir. 1985).

The defendant's claim of undue prejudice and surprise is unfounded. This amendment is not offered at the eve of trial. See Stated Federal Savings & Loan Association v. Campbell, 848 F.2d 1186 (11th Cir. 1988). Permitting the debtor to amend its complaint allows this case to be decided on its merits rather than on procedural technicalities. Wright & Miller Federal Practice and Procedure 1471 (2d ed. 1990). Obviously, allowing the amended complaint delays trial, but deciding this case on its merits by allowing the amended complaint outweighs any prejudice caused by delay. Allowing sufficient time for defendant to prepare a response to the amended complaint and conduct reasonable discovery eliminates any surprise or potential prejudice. A full fair hearing on the merits cannot be prejudicial to the defendant.

#### **SUMMARY JUDGMENT**

A summary judgment is an extraordinary remedy. Barr v. Juniata Valley Bank, (In re: Delancy) 77 B.R. 424 (Bankr. S.D.N.Y. 1987). The party seeking summary judgment bears the burden of establishing that there is no genuine issue as to any material facts in dispute and that they are entitled to judgment as a matter of law. See generally, Bankruptcy Rule 7056; Clark v. Union Mutual Insurance Company, 692 F.2d 1370, 1372 (11th Cir. 1982). The evidence submitted on the motion for summary judgment must be considered in a light most favorable to the party opposing the motion. Cowan v. J.C. Penny Co., 790 F.2d 1529, 1530 (11th Cir. 1986). In applying this standard to the allowed amended complaint, the defendant is entitled to partial summary judgment as a matter of law to all counts alleging a preferential transfer under~

Under counts 1, 2, 3 and 4 of the complaint the debtor alleges and seeks to recover various preferential transfers to the defendant pursuant to 11 U.S.C. §547(b)(4)(A), within ninety (90) days before the date of the filing of the petition, and pursuant to 11 U.S.C. §547(b)(4)(B), between ninety (90) days and one (1) year. In the amended complaint, the debtor sufficiently alleges each element required to establish a preferential transfer. However, the undisputed facts as set forth in the debtor's schedules, approved disclosure statement and allowed proofs of claim in the underlying Chapter 11 case bar a determination that any of the alleged transfers enabled the defendant to receive more than it would have received if the case proceeded under Chapter 7. 11 U.S.C. §547(b)(5). "The appropriate date for determination of whether a payment is preferential is the date of filing of the

---

<sup>2</sup>11 U.S.C. §547(b) provides in pertinent part:

(b) Except as provided in subsection (C) of this section the trustee may avoid any transfer of an interest of the debtor in property -

(1) to or for the benefit of a creditor;  
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made -

(A) on or within 90 days before the date of the filing of the petition; or

(B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if

(A) the case were a case under Chapter 7 of this title;

(B) the transfer had not been made and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Chapter 11 petition." In re: Continental Country Club, Inc., 108 B.R. 327, 332 (Bankr. M.D. Fla. 1989), (quoting Neuger v. United States (In

re: Tonna Corporation), 801 F.2d 819 (6th Cir. 1986). If the unsecured claims cannot be satisfied in full, any transfer would be sufficient to satisfy the burden of 11 U.S.C. §547(b)(5).

In re: Air Conditioning, Inc. of Stuart, 845 F.2d 293 (11th Cir. 1988). The contrary is also true. The defendant may rely upon the debtor's schedules and filed and allowed claims to establish whether a 100 percent distribution to unsecured creditors would be possible. See, In re: Continental Country Club, Inc., supra; Flatau v. Tribble's Shoes, Inc. (In re: Lawrence) 82 B.R. 157 (Bankr. M.D. Ga. 1988). c.f., In re: Jackson, 49 B.R. 298 (Bankr. Kans. 1985) (court may take judicial notice of prior petitions); Allen v. Newsome, 795 F.2d 934 (11th Cir. 1986) (district court may take judicial notice of prior habeas corpus applications).

The schedules filed in the debtor's Chapter 11 case establish that as of the date of filing for relief under Chapter 11 the debtor had assets of

real property of a value of	\$120,000.00 and
personal property of a value of	<u>637,151.96</u>
totaling	\$757,151.96.

The scheduled assets do not include the claims now asserted against this defendant. By order dated November 15, 1989 in the Chapter 11 case, the debtor's disclosure statement dated October 3, 1989 and amended November 15, 1989 was approved. The order provided in part:

B: The values of assets listed in Exhibit "A" of the disclosure statement . . . are hereby approved . . . .

Exhibit "A" valued the debtor's assets at \$892,635.66. According to the schedules,

the debtor had liabilities for

priority claims of	\$162,000.00,
secured claims of	134,881.23 and
general unsecured claims of	<u>396 173.71</u>

totaling \$693,054.94.

The allowed and unobjected to claims in the chapter 11 case total \$634,160.46.

According to the debtor's schedules, disclosure statement and allowed claims, as of the date of filing the debtor was not insolvent. Insolvency is a financial condition such that the sum of an entity's debts is greater than all of the entity's property, taken at a fair valuation. 11 U.S.C. §101(32). As of filing, the debtor was solvent. These irrefutable facts taken in a light most favorable to the debtor clearly establish that all creditors would have been paid in full in a chapter 7 liquidation. When the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial and summary judgment should be granted. In re: Network 90°, Inc., 98 B.R. 821 (Bankr. N.D. Ill. 1989). No preferential transfer occurred under 11 U.S.C. §547(b) and summary judgment for the defendant is required as to counts 1, 2, 3, and 4 of the complaint.

Debtor's counts 5 and 6 of the complaint are knew and allege violations of the automatic stay of 11 U.S.C. §362(a). While defendant attempted to address these counts in its brief in

opposition to the amended complaint, the defendant has not filed responsive pleading to these counts, nor have the parties had adequate time for discovery on the issues raised to consider summary judgment at this time.

It is therefore ORDERED that debtor's amended complaint is allowed;

further ORDERED that the motion for summary judgment of defendant, Toledo Scale Corporation is granted as to all counts of plaintiff's complaint alleging a preferential transfer under 11 U.S.C. 547, counts 1, 2, 3, and 4;

further ORDERED that motion for summary judgment or in the alternative dismissal of counts 5 and 6 of debtor's complaint is denied without prejudice; and

further ORDERED that defendant shall file responsive pleadings to counts 5

and 6 of plaintiff's allowed amended complaint within thirty (30) days of the entry of this order.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 29th day of March, 1991.